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91-1207

No. ____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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FRONT ROYAL AND WARREN COUNTY INDUSTRIAL PARK CORPORATION,

FRED W. MCLAUGHLIN AND GLADYS L. MCLAUGHLIN,

*Petitioners,*

v.

TOWN OF FRONT ROYAL, VIRGINIA, et al.

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether in an action under 42 U.S.C. § 1983, the court of appeals may vacate a lower court's decision that a local government and its officials have violated constitutional rights of due process and equal protection, based on its own conclusion that the district court should have abstained under the *Burford* abstention doctrine merely because the unlawful conduct occurred under color of a state's "land use" regulatory scheme and where the elements required for such abstention were not present.

2. Whether a court of appeals may rely upon a virtual *per se* rule of abstention in constitutional cases arising in the context of state and local "land use" regulations and, in doing so, effectively deprive an entire class of persons from access to the federal courts under 42 U.S.C. § 1983.

## LIST OF PARTIES

The parties to the proceeding below were Petitioners Front Royal & Warren County Industrial Park Corporation ("Corporation"); and Fred W. McLaughlin and Gladys L. McLaughlin ("McLaughlins"). The McLaughlins and the Corporation were plaintiffs in the district court and appellees/cross-appellants in the court of appeals. The Corporation is a private corporation, and has no publicly-owned parent, subsidiary, or affiliate.

The Respondents were defendants in the district court and appellants/cross-appellees in the court of appeals. The Respondents include (1) the Town of Front Royal, Virginia; (2) John Marlow, individually and as Mayor of the Town of Front Royal; (3) Michael Kitts, individually and as a member of the Town Council of the Town of Front Royal; (4) Edwin L. Pomeroy, individually and as a

member of the Town Council of the Town of Front Royal; (5) Albert G. Ruff, Jr., individually and as a former member of the Town Council of the Town of Front Royal; (6) George E. Banks, individually and as a former member of the Town Council of the Town of Front Royal; and (7) Brackenridge H. Bentley, individually and as Town Manager of the Town of Front Royal.

The *amici curiae* in the court of appeals were the Virginia Association of Counties and the Local Government Attorneys of Virginia, Inc.

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*Petitioners*,

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Front Royal & Warren County Industrial Park Corporation, and Fred W. McLaughlin and Gladys L. McLaughlin, respectfully pray that a writ of certiorari be issued to review the decision and opinion of the United States Court of Appeals for the Fourth Circuit entered on September 19, 1991, and the

order denying a petition for rehearing entered on October 28, 1991.

## OPINIONS BELOW

The final opinion of the United States Court of Appeals for the Fourth Circuit ("court of appeals") is reported in *Front Royal & Warren County Industrial Park Corp. v. Front Royal*, 945 F.2d 760 (4th Cir. 1991) ("*Front Royal IV*") and is reprinted in the Appendix at 1a. Its decision denying the Petition for Rehearing has not been reported but is reprinted in the Appendix at 74a.

The court of appeals' opinion vacated and remanded the orders and opinions of the Honorable James H. Michael, Jr., of the United States District Court for the Western District of Virginia, granting summary judgment and awarding damages to the Petitioners under 42 U.S.C. § 1983 for violation of their constitutional rights of due process and equal protection by the

Town of Front Royal, Virginia. The district court's decision granting summary judgment is reported in *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 708 F. Supp. 1477 (W.D. Va. 1989) ("*Front Royal II*"). App. at 43a. The court's decision awarding damages based on its findings of constitutional violation is reported in *Front Royal & Warren County Industrial Park Corp. v. Front Royal*, 749 F. Supp. 1439 (W.D. Va. 1990) ("Front Royal III"). App. at 20a.

The court of appeals had previously affirmed the district court's decision striking the Respondents' legislative immunity defenses on interlocutory appeal. This decision by the court of appeals is reported in *Front Royal & Warren County Industrial Park Corp. v. Front Royal*, 865 F.2d 77 (4th Cir. 1989) ("*Front Royal I*"). App. at 12a.

## STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the court of appeals by virtue of 28 U.S.C. § 1254(a). This Petition for a Writ of Certiorari is timely filed pursuant to Rules 13 and 14 of the Rules of the United States Supreme Court, having been filed within 90 days of a denial by the court of appeals, on October 28, 1991, of a petition for rehearing of that court's final order and opinion decided on September 19, 1991.

## CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The statutory provision of federal law relied on is the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983. The relevant provisions of this statute provide in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant portion of 28 U.S.C. § 1343(a)(1982) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . .

The relevant part of the Fifth Amendment of the United States Constitution provides:

> nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant part of the Fourteenth Amendment to the United States Constitution provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case presents the Court with the opportunity to resolve a serious conflict in the circuits regarding the proper application of the doctrine of abstention in cases filed under 42 U.S.C. § 1983 involving local or state land use regulation. It arises in the unique situation where the United States District Court had reached an affirmative determination on the merits that the actions of a local government and its officials had deprived Petitioners of their federal constitutional rights to due process and equal protection. The court of appeals, despite having previously

rendered an opinion in the case, then held that *Burford* abstention was mandated because the case could be characterized as involving sensitive and complex issues of state and local land use under the state's regulatory scheme.

The Petitioners are the owners of property now located in the Town of Front Royal, Virginia. The McLaughlins[1] own approximately fifty-five acres of property zoned and subdivided for residential use. The Front Royal & Warren County Industrial Park Corporation owns approximately eighty-six acres of property zoned and subdivided for industrial use. Fred McLaughlin was the president of the Corporation.

In Virginia, towns such as Front Royal grow in size by annexing areas of

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[1] Gladys McLaughlin has died since the initiation of this litigation, but the remaining individual Petitioner will be referred to in the plural.

adjacent jurisdictions, in accordance with a statutory process for the expansion and contraction of municipal boundaries. That process is intended to promote and facilitate the provision of public facilities to the developing areas of such towns.[2] The annexation process may be initiated by ordinance of the Town, or by petition of a majority of landowners in the affected area.[3]

In the 1970's, the Town initiated annexation proceedings to incorporate the McLaughlin property into its boundaries, and with other properties, it was duly

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[2] The process of annexation is indeed authorized by state law. *See* Va. Code Ann. § 15.1-945.1, *et. seq.*, § 15.1-1032, *et seq.*; *see generally* Bain, C. W., *Annexation in Virginia: The Use of the Judicial Process for Readjusting City-County Boundaries*, University of Virginia Press, 1966.

[3] After the initial ordinance or petition has identified the area to be annexed, a special annexation court is convened by the Virginia Supreme Court. Va. Code Ann. § 15.1-1038. This court is of limited life and authority, and is authorized to set the terms and conditions upon which any annexation may be approved. *See Va. Code Ann.* § 15.1-1042, 1047.

annexed on December 31, 1976. The annexation order expressly required the Town to construct sanitary sewer lines to serve the McLaughlin property within five years of the date of annexation.[4]

Despite the McLaughlins' requests, the Town did not provide the sewer lines within the required time. In late 1985, the McLaughlins filed a formal application requesting the Town to extend service to their property, but were refused. The Town's Attorney advised the Town Council that it was indeed required to provide this service, to no avail.

In June of 1986, the Town again refused to extend sewer to the McLaughlin property. At about this time, it did extend sewer lines to other properties subject to the same order. One such property that received service was owned

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[4] App. at 53a-55a, 83a.

by the Town's Mayor, who himself relied on the unambiguous mandate of the annexation order to support his claim to sewer service. He was subsequently able to develop his property as a residential subdivision at the same time that similar use was denied to the McLaughlins.

In 1978, the Corporation's property was also annexed by the Town, pursuant to the order of another annexation court that had been convened in response to a petition initiated by area landowners, including the Corporation. This 1978 annexation order directed the Town to provide sewer service to the Corporation's property within five years.[5]

In 1983, this second annexation court was reconvened at the request of the Corporation and the other affected property owners. On the Town's motion,

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[5] App. at 89a-90a.

the annexation court extended the original five year period for the provision of sewer service an additional two years.[6]

By 1986, the Town had still not provided the required service to the Corporation property. The Corporation, along with others, formally requested that the sewer be extended to their properties. In June of 1986, after the Town's Attorney had once again advised the Council that such service was required by the annexation orders, the Council again refused to provide the required sanitary sewer to the Corporation property.

During this same period, the Town provided service to a competing industrial development located directly across the road from the Corporation's property. This competing industrial park was owned

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[6] The 1983 annexation decree provided that the court could be reconvened by a party within two years of the effective date of its order. This period expired in December, 1985. App. at 97a-98a.

by the local Industrial Development Authority, in which the Town had a substantial financial interest.

In February of 1987, having been repeatedly frustrated in their efforts to acquire the required service from the Town, the McLaughlins and the Corporation filed separate suits in the district court seeking damages under 42 U.S.C. § 1983 for violation of their federal rights of due process and equal protection.[7] In their suits they alleged that the Town and its officials, including the Mayor, had ignored the express terms of the annexation orders applicable to their properties, and had arbitrarily refused to provide service to their properties while at the same time providing this service to

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[7] App. at 106a and 99a, respectively.

similarly-situated properties.[8] Both alleged that the Town's actions had prevented the development of their property as otherwise permitted by local law and deprived them of all reasonable and economically viable use of their land in violation of the Fifth and Fourteenth Amendments to the Constitution.[9]

The district court consolidated the two cases for trial. The Town and its officials first raised numerous affirmative defenses including absolute legislative and qualified immunity. The Petitioners moved to strike these defenses, and the trial court granted that

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[8] The named defendants were the Town and the individual officials who are Respondents herein. For convenience, they shall hereinafter be collectively referred to as the "Town".

[9] The suits did not challenge the constitutionality of Virginia's annexation procedures nor did they question or challenge any decision of the annexation court pursuant to such procedures. As discussed more fully herein, the sole issue presented was whether the acts of the Town, under color of law, had violated Petitioner's federal rights. See App. at 99a, 106a.

motion as to the Town's defense of absolute legislative immunity. The Town filed an interlocutory appeal to the court of appeals.

The court of appeals affirmed the district court's holding that absolute legislative immunity was not available to the Town or its officials. In doing so, it expressly concurred with the district court's finding that the annexation orders *had unambiguously required the Town to provide sewer* and held *that these orders had removed whatever discretion the Town might otherwise have had to decline plaintiffs requests for sewer service.*[10] The court of appeals' decision also noted that the annexation courts in question were no longer in existence.[11] It

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[10] App. at 15a, 16a.

[11] During the argument on the interlocutory appeal, the Town's counsel had acknowledged that the annexation court no longer existed. Notwithstanding this fact, the Town did not contest

remanded the case to the district court for further proceedings.

On remand, the parties filed cross-motions for summary judgment. The district court granted the Petitioners' motions, ruling that the Town's actions had served no legitimate government purpose, and that the refusal to provide sewer service ordered by clear, explicit and unambiguous annexation orders deprived the owners of their equal protection of the laws.[12] The lower court also noted that the Town had been repeatedly advised of the mandatory nature of this requirement by its attorney, but had disregarded that advice. It found no

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the continuing validity of the annexation court's decree. App. at 16a.

[12] In reaching this conclusion, the district court noted that the court of appeals had previously agreed with its view that the terms of the decrees were clear and unambiguous and had deprived the Town of discretion with respect to the provision of the necessary utility services. App. at 49a.

rational or otherwise lawful basis for the Town's refusal to provide service to the owners. It also found that the Town's actions were the sole reason that the Petitioners had been unable to develop their property. The court also concluded that the Town's deliberate actions had prevented the otherwise lawful development of the property and had effectively deprived the Petitioners of the economically viable use of their property without due process of law, and had thus effected a regulatory taking of the property.[13]

In granting summary judgment on the merits, the trial court explicitly rejected the Town's defense of qualified immunity on the ground that the Town had

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[13] The district court's rulings on the merits of any of the questions decided by that court are not on appeal to this Court. This Petition is limited to the court of appeals' erroneous decision to abstain.

no discretion to deny service under the plain meaning of the annexation orders.[14] It also rejected the Town's exhaustion arguments because there were no available or complete state judicial remedies. The district court found that the Petitioners could not reconvene the annexation court, and that since the annexation courts were courts of limited authority, they would not afford complete relief.

Having found that the Town had violated the Petitioners' constitutional rights, the court held a bench trial on the issue of damages after which it awarded $176,526.56 to the McLaughlins, and $489,072.59 to the Corporation. The court also awarded Petitioners attorneys' fees.[15] The parties filed cross appeals.

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[14] App. at 16a.

[15] App. at 40a.

On this second trip to the court of appeals, the issue of abstention was raised for the first time by amici curiae, who urged the court of appeals to abstain because the case involved issues of local sensitivity and land use policy, and because state remedies were potentially available. The court of appeals seized on the amici's argument and vacated the district court's decision. Despite the district court's finding that a constitutional violation had occurred, the court of appeals held that *Burford* abstention was warranted because the annexation process is a matter of state and local law, and because there might be other unidentified state remedies available to the plaintiffs.

The court of appeals expressed uncertainty, however, as to whether any

state remedy was available.[16] Thus, although it had vacated the district court's decision based on *Burford* abstention, it directed the lower court to retain federal jurisdiction over the federal claim pending the outcome of the uncertain state proceedings.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS' APPLICATION OF ABSTENTION DOCTRINE IS CONTRARY TO THE DECISIONS OF THIS COURT AND REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF ITS APPLICATION TO CASES BROUGHT UNDER 42 U.S.C. § 1983.

#### A. This case presents a significant opportunity for the Court to clarify the standards for abstention in land use cases.

This case provides this Court with an opportunity to clarify the standards by which the lower federal courts are to abstain in federal constitutional cases brought under 42 U.S.C. § 1983 asserting

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[16] App. at 10a.

the misconduct of local officials arising under state and local land use regulation.

The Petitioners filed suit in federal court under 42 U.S.C. § 1983 alleging that the Town and its officials had arbitrarily and under color of law violated their federal rights of equal protection and due process. After almost five years of litigation, including an interlocutory trip to the court of appeals, the trial court awarded them damages for these violations. On return to the court of appeals, the court seized on the abstention arguments presented by amici, and on its own instance, abstained from exercising its authority and directed the Petitioners to pursue state remedies that both it and the district court had already recognized could not offer adequate

relief.[17] The court's decision to abstain was based on its conclusion that the case arose in the context of local and state land use law and as such presented sensitive issues of local policy.[18]

The issue presented is a matter of substantial concern to both federal litigants and the federal courts. The disparate and confusing treatment currently afforded this question by the respective circuits, as here exemplified

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[17] The district court had previously held that such relief was unavailable and, if available, would not be complete. App. at 52a-53a. The court of appeals had also previously recognized that any such state forum had ceased to exist. App. at 16a. Its second opinion also expressed uncertainty regarding the availability of such relief stating that

> [T]here is a question whether the Courts could be reconvened at this time. However, because of the defendants' behavior in this case contributing to the passing of these deadlines, *it might be that the Annexation Courts could reconvene under the special circumstances of this case*. That is not for us to decide, however.

App. at 10a, (emphasis supplied.)

[18] App. at 8a, 10a.

by the Fourth Circuit, has caused disruption and delay in the best of cases, and the loss of federally-protected rights in the worst.

The Petitioners acknowledge that the garden variety disputes which arise under various local and state regulatory schemes generally do not present federal constitutional issues of substantial import. There are, however, indisputably cases which do involve legitimate federal claims. In such cases, the landowner is entitled to select the federal forum. Such a case is now presented to this Court.[19]

The confused state of affairs among the respective circuits regarding the proper application of the abstention

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[19] Arguably, the present case does not involve traditional zoning or land use regulation. However, both the amici and court of appeals characterized the case as representative of such a species and based their decisions accordingly. See App. at 6a.

doctrine in so-called "land use" cases has caused many federal courts summarily to dismiss such claims without proper analysis of the standards for abstention established by this Court.[20] Sensing a "land use" case, they often give little or no consideration to the *bona fide* constitutional claims which may be raised, or the standards that this Court has established for application of the doctrine. The Fourth Circuit in particular has developed what amounts to a *per se* rule requiring abstention in such cases.[21]

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[20] Blaesser, *Closing the Federal Court House Door on Property Owners: The Ripeness and Abstention Doctrines in a Section 1983 Land Use Case*, 2 Hofstra Prop. L.J. 73, 119 (1988) [hereinafter "Blaesser"]. Blaesser notes that in land use cases, the federal courts have increasingly ignored and distorted the original tests of abstention and that the exception has instead become the rule. Id. at 119. He identifies the Fourth Circuit as one of the leading proponents of this trend.

[21] In its decision, the court of appeals has relied on its own unique view of the abstention doctrine as it applies to "matters of state and local land use" law. App. at 7a-11a. See e.g.,

This Court has long recognized that rights in property are basic, and subject to constitutional protection. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). This Court has only recently reaffirmed that the rights of property owners are indeed worthy of constitutional protection, even when arising in the context of land use. *Nollan v. California Coastal Comm'n, 483 U.S. 825, 733, n.2. (1987).* Furthermore, damages are an essential part of the remedy for constitutional violations. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

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*Browning-Ferris, Inc. v. Baltimore County*, 774 F.2d 77 (4th Cir. 1985); *Caleb Stowe Assocs., Ltd. v. County of Albemarle*, 724 F.2d 1079 (4th Cir. 1984); *Fralin and Waldron, Inc. v. Martinsville*, 493 F.2d 481 (4th Cir. 1974). As discussed herein, its approach is in sharp conflict with the decisions of this Court and of the other circuits that have addressed the question.

The court of appeals has now created a doctrine of per se abstention in federal cases arising in the context of local or state "land use" regulation. It has concluded that *all land use matters necessarily involve a complex statewide regulatory scheme* that warrant abstention by the federal courts. There is, however, no principled basis to conclude that violations of property rights under the color of such state or local land use regulations is a species of government conduct not subject to constitutional protections. The court's invocation of *Burford* abstention merely because a case involves a land use regulatory scheme is in direct contrast to all other situations where the federal courts have enforced federal civil rights. *See District Properties Assoc. v. Dist. of Columbia*, 743 F.2d 21, 29, n.5 (D.C. Cir. 1984).

**B. The Court of Appeals' reliance on a per se rule of abstention in land use cases arising under 42 U.S.C. § 1983 is contrary to the decisions of this Court and congressional authority.**

The doctrine of abstention is a judicially-created means by which the court may decline to grant federal equitable relief under certain *limited* circumstances.[22] These doctrines are an extraordinary and narrow exception to the federal court's duty to adjudicate federal claims. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 236 (1984); *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976); *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188 (1959). This Court has repeatedly emphasized that abstention is

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[22] The two major abstention doctrines are the *Pullman* abstention doctrine first established in *Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941) and the so-called *Burford* doctrine first set forth in *Burford v. Sun Oil,* 319 U.S. 315 (1943). A third doctrine established in *Younger v. Harris,* 401 U.S. 37 (1971) was not implicated in this case.

warranted only in "narrowly limited special circumstances." *See New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 359 (1989); *Hawaii Housing Authority*, 467 U.S. at 236.

The *Burford* doctrine relied upon by the court of appeals is perhaps the most limited of the recognized doctrines.[23] The policy considerations of *Burford* warrant independent analysis. *See New Orleans Pub. Serv.*, 491 U.S. at 360.[24]

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[23] In *Burford*, the federal court refused to exercise its equitable remedies in a case involving a comprehensive statewide regulatory scheme where there also existed adequate and expeditious state remedies consolidated in a centralized state court in a case where federal jurisdiction was based on the court's diversity jurisdiction. 319 U.S. at 317.

[24] In contrast to the *Burford* doctrine, *Pullman* abstention is generally applicable to situations where there are critical unsettled questions of state law subject to a state court interpretation that will avoid or substantially alter the federal constitutional questions. *See Hawaii Housing Authority*, 467 U.S. 229. However, the mere existence of a possible question of state law does not warrant abstention because the possibility of state law questions nearly always exists. *Id.* at 237. Here, the district court concluded and the court of appeals concurred that the annexation courts' orders were clear and unambiguous and there simply was no such unsettled

*Burford* abstention is based upon a deference and sensitivity to state regulatory schemes. This deference and sensitivity is not all encompassing. *Burford* does not automatically apply in all situations where such a regulatory scheme exists. *New Orleans Pub. Serv.*, 491 U.S. at 359. This Court has recently held that in those situations where timely and adequate state court review was available, a federal court sitting in equity must decline to interfere with the orders or proceedings of a state administrative agency where there exists a difficult question of state law or policy, the importance of which transcends the specific result in the case at bar, or where the exercise of equitable federal authority would be disruptive of the

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issue of state law. (App. at 15a, 16a, 49a) Thus, *Pullman* principles were not implicated in this case.

state's efforts to establish a coherent statewide policy. Id.

The doctrine is not to be applied in blind disregard of the facts. Id. at 362. In *New Orleans Pub. Ser.*, this court relied upon its earlier decision in *Public Util. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), in which it had declined to abstain in a situation where no inquiry was necessary beyond the orders themselves. Id. at 363. Although *Burford* is concerned with protecting state administrative processes, it does not require abstention whenever a regulatory system exists. *New Orleans Pub. Serv.*, 491 U.S. at 362. Certainly, it does not require abstention merely because there exists a state order the meaning of which requires no interpretation to reach the constitutional issue.

The court of appeals paid no heed to these limitations. The district court and

court of appeals had both acknowledged that there were no certain or complete state remedies. The annexation courts no longer existed. There was no significant or otherwise overruling issue of state law presented nor was the court asked to use its equitable remedies to disrupt ongoing proceedings. The sole issue of state presented was whether in the context of the plain meaning of the annexation orders, Town officials had violated Petitioners' constitutional rights.[25] The court of appeals has simply disregarded the clear guidance of this Court and created its own per se rule based on its incorrect belief that all such cases

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[25] The orders are relevant only to the extent that they form the *source of the rights* of which the Town was found to have deprived the Petitioners. It is the actions of the Town under color of state law, not the state's policies which were at issue. The district court and court of appeals both had previously recognized that these directives were plain and explicit.

necessarily involve sensitive issues of local policy which mandate abstention.[26]

*Burford* was a diversity case. 319 U.S. at 317. The presence of a federal cause of action raises the level of justification needed for abstention. *See Colorado River Water Conservation Dist.*, 424 U.S. at 815. For this reason, cases arising under the Civil Rights Act are the least likely candidates for abstention. *See Canton v. Spokane School Dist. No. 81*, 498 F.2d 840 (9th Cir. 1976). The court of appeals' use of abstention to vacate a decision by the district court reflects a serious misunderstanding of the federal

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[26] The court of appeals not only disregarded the limitations on abstention announced by this Court but gave absolutely no consideration to any of the equitable factors, all of which were present in this case, which militate against abstention. The timely adjudication of claims is an essential element of justice. *Mashuda*, 360 U.S. at 196-197. The use of abstention is not appropriate where the parties have consumed considerable time and expense in pursuing their claims, and where spiriting them out of the federal system would accomplish nothing except to require still another lawsuit, already identified as futile, with added delay and expense for all parties. Id..

remedy under 42 U.S.C. § 1983.[27] The federal courts are the guardians of federal constitutional rights. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982); *Felder v. Casey*, 487 U.S. 131 (1988). The exhaustion of state judicial and administrative remedies is not a prerequisite to a section 1983 action in federal court. *Patsy*, 457 U.S. at 512.[28] Moreover, the federal courts cannot refuse to administer federal remedies merely because there may be a state remedy. *New Orleans Pub. Serv.*, 491 U.S. at 359.[29]

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[27] Section 1983 is intended to provide a federal remedy for municipal conduct taken under color of law that violates fundamental constitutional rights. *Monell v. Department of Social Services*, 436 U.S. 638 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980). The federal district courts have original jurisdiction to enforce this statute. 28 U.S.C. §§ 1331, 1343.

[28] This is particularly true in situations such as this where the remedies available under the state scheme are not coextensive with the remedies available in a federal court. *See Silverman v. Barry*, 727 F.2d 1121, 1123, n.3 (D.C. Cir. 1984).

[29] The court of appeals speculated that relief might be available under parallel provisions of the Virginia Constitution. The existence of

The district court properly recognized its duty to adjudicate this remedy and did so. The court of appeals did not.

## II.

**THE CIRCUIT COURTS ARE IN CONFLICT AND CONFUSION WITH RESPECT TO ABSTENTION IN LAND USE CASES, AND THIS COURT MUST BRING ORDER TO THE FIELD.**

The various circuits have increasingly relied on abstention as a mandatory rule rather than a limited exception to their duty to adjudicate federal claims. The court of appeals' decision is the most recent example of this increasing tendency among the circuits, particularly the Ninth and Fourth, to identify an array of state and local regulations and summarily conclude

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such parallel provisions of state law is no basis for abstention of federal jurisdiction. See *Hawaii Housing Authority*, 467 U.S. at 237, n.4 [citations omitted]. Indeed, the acceptance of such a proposition would render the federal courts virtually powerless to enforce federal rights.

that the existence of such a regulatory system demonstrates a sensitive area of social policy involving unsettled issues of state law. *See e.g., Pearl Inv. Co. v. City of San Francisco*, 774 F.2d 1460 (9th Cir. 1985), cert. denied, 476 U.S. 1170 (1986). The court of appeals' broad expansion of the *Burford* rationale to create a per se rule of abstention that is generally applicable to land use cases is but the most recent example of this tendency.[30]

The circuits are in confusion and as a means of emerging from it, several have chosen to apply the abstention doctrine in

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[30] Blaesser has noted that both the Ninth and Fourth Circuits have adopted what "approaches a per se rule of abstention in all cases involving land use or zoning because of their stated uncertainty in deciding questions of fact in light of the many local and statewide land use laws[.]" *See* Blaesser, *supra* note 22 at 132. After reviewing the federal decisions applying abstention, the author concluded that the various circuits have ignored and distorted the traditional abstention standards and this has resulted in the virtual exclusion of property owners from the federal courts. *Id.* at 124-125, 135.

circumstances that this Court has never intended. This is particularly true of *Burford* abstention, which simply has no place in the world of land use disputes.[31]

The mere existence of a state regulatory scheme, and certainly not the mere existence of state enabling statutes, does not in itself mandate *Burford* abstention, or indeed abstention on any grounds, without the kind of detailed analysis that the court has commanded. There can be no application of a blanket rule of abstention to land use cases. *New Orleans Pub. Serv., supra; Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *see*

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[31] The conclusion underlying the assumption that land use is a complex statewide scheme is incorrect. In fact, of the fifty states only four -- Florida, Hawaii, Georgia and Oregon -- have state comprehensive planning acts, while California has adopted some statewide environmental regulations. Blaesser, supra, n. 20. at 119. However, even in those states which have adopted such comprehensive regulation, such regulatory schemes generally lack the comprehensiveness and coherency contemplated by *Burford*. *Id.* at 119, n.265.

*also Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3rd Cir. 1982), cert. denied, 456 U.S. 990.

The Third Circuit, is in sharp contrast to the approach of the Fourth and the Ninth. The Third Circuit holds that because land use is generally local in nature, Burford abstention has no applicability to such cases. *Heritage Farms Inc.*, 671 F.2d at 747 (1982); *See also Izzo v. Borough of River Edge*, 843 F.2d 763 (3d Cir. 1988). In the absence of a uniform statewide land use policy, there can be no danger of disruption of such policy. 671 F.2d at 747. The Third Circuit has recognized that in situations where a complaint sets forth a valid federal claim, such as unlawful conduct by local officials, the exercise of federal authority would not necessarily disrupt state policies or plans of land use. *Id.*

The District of Columbia Court of Appeals has also rejected the mechanical application of *Burford* abstention in cases involving local land use regulation. In *Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984), Judge Bork, writing for the court, noted that *Burford's* sensitivity to local concerns and policy could be used as justification to avoid federal interference in any state or local regulatory program. He specifically rejected such a broad application of the doctrine noting that sensitivity and deference to state or local policy standing alone does not provide a principled rationale for abstention where federal jurisdiction exists. Id. at 1222-23, n.4. The First and Eleventh Circuits have also recognized that local and state land use regulatory schemes generally do not satisfy the requirements for *Burford* abstention. *See Urbanizadora Versalles, Inc. v. Rios*, 701

F.2d 993 (1st Cir. 1983); *Nasser v. City of Homewood*, 671 F.2d 432, 439, n.6 (11th Cir. 1982).

In contrast to the First, Third, Eleventh and D.C. Circuits, the Ninth Circuit shares the Fourth Circuit's belief that land use cases involve sensitive areas of local policy. *See e.g. C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375 (9th Cir. 1983). However, although it is inclined to abstain from such cases, it has recognized that although land use schemes may be complex, they are essentially *local* in nature and *Burford* abstention is generally not applicable to such schemes. *Int'l Brotherhood of Electrical Workers, Local 1245 v. Pub. Serv. Comm'n*, 615 F.2d 206, 211 (9th Cir. 1980).[32]

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[32] Although, the Ninth Circuit has joined with other circuits in rejecting Burford's applicability to land use cases, its decisions reflect the lower court's tendency to blur the distinction between

The conflicting approaches of the various court of appeals demonstrate a serious misunderstanding of the relationship between a federal court's equitable authority to abstain and the original jurisdiction created by Congress. The decisions of the Ninth and Fourth Circuits are particularly egregious examples of how federal courts have strained the Judicial standards supporting abstention to create a per se doctrine of "land use" abstention that in circumstances that were never intended by this Court or by Congress. The per se application of abstention to cases that arise in the context of local or state

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the doctrines to achieve their desired end. The Ninth Circuit purportedly relies on a *Pullman* analysis. However, a critical prong of its analysis is Burford's "sensitivity to local land use policy." Thus, in both purpose and its analysis is closely related to that applied by the Fourth Circuit. *See* Blaesser, *supra* note 20, at 112. The Ninth Circuit's analysis has been applied by at least one federal district court in the Fourth Circuit. *See Northern Virginia Law School v. City of Alexandria*, 680 F.Supp. 222 (E.D.Va. 1988).

land use regulation simply has no legitimate justification. Indeed, it threatens the viability of the express federal remedy created by Congress.

This Petition should be granted to provide guidance to the lower courts and to clarify the application of abstention in federal cases presented under 42 U.S.C. § 1983. If this Petition is granted, this Court can pass upon the applicability of *Burford* abstention as it applies to federal claims arising out of a local authority's abuse of their land use regulatory powers. In doing so, the Court may determine, as have the majority of circuits, that the *Burford* doctrine does not generally support abstention in land use cases. Alternatively, the Court may also establish specific guidelines that balance the federal court's sensitivity to local concerns with the rights of property owners to prompt access to federal courts.

In any event, the Petitioners intend to vigorously argue that there is no place for a mandatory rule of abstention which effectively excludes federal relief for constitutional claims arising from local or state land use regulation.

**CONCLUSION**

Petitioners pray that a Writ of Certiorari issue to the Court of Appeals for the Fourth Circuit. That court and others similarly inclined stand in conflict with other circuits with regard to the proper application of abstention doctrine in this area of the law. This Court must instruct lower federal courts to consider legitimate constitutional claims arising in land use cases. In so doing, it need not open the courthouse doors to routine land use disputes, but where there are legitimate federal claims, as the district court found here, there is

a right to have those heard in a federal forum.

The Petitioners respectfully request that a writ be issued and that they be granted leave to present their argument more fully.

Respectfully submitted,

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